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11 March 2009  
by express service



Hon. Arne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E St., SW  
Washington, D.C. 20024

224670

Re: Missouri-Kansas-Texas Railroad -  
Abandonment - in St. Charles, et al  
Counties, MO, AB 102 (Sub-no. 13)

Dear Madam Secretary.

Enclosed for filing please find a motion for enforcement of this agency's section 106 (National Historic Preservation Act) responsibility in connection with a proposed abandonment of an historic bridge (at Boonville, Missouri) on the railbanked rail line above. As explained in the motion, this agency's predecessor reserved jurisdiction to perform the required section 106 review in the event a railroad sought to exercise abandonment authority under the otherwise applicable Certificate of Interim Trail Use. This motion is on behalf of Rails to Trails Conservancy, Save the Katy Bridge Coalition, and Missouri Parks Association (collectively, "Commenters").

Inasmuch as the railroad involved has removed a 62-foot section of the bridge already and the bridge appears to be under continued threat, Commenters also move that the railroad be ordered to cease all demolition activities until this agency's section 106 review is complete.

Thank you for your assistance in this matter.

**ENTERED**  
**Office of Proceedings**

**MAR 12 2008**

**Part of**  
**Public Record**

Very truly,

Charles H. Montange  
for Rails to Trails Conservancy,  
Save the Katy Bridge Coalition,  
and Missouri Parks Foundation

Encls.

cc. Counsel per cert. serv. (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

MISSOURI-KANSAS-TEXAS RAILROAD           )  
COMPANY - ABANDONMENT - IN           )  
ST. CHARLES, WARREN, MONTGOMERY,    ) Ab 102 (Sub-no. 13)  
CALLAWAY, BOONE, HOWARD, COOPER    )  
AND PETTIS COUNTIES, MO            )

MOTION to PROVIDE AND TO ENFORCE COMPLIANCE  
with SECTION 106

Rails to Trails Conservancy (RTC),<sup>1</sup> Save the Katy Bridge Coalition, Inc. (Coalition),<sup>2</sup> and Missouri Parks Association<sup>3</sup> (Parks) (collectively RTC, Coalition and Parks will be referred to herein as "Commenters") move that this Board comply with Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 4701, in connection with efforts by Union Pacific Railroad

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<sup>1</sup> Rails to Trails Conservancy (RTC) is a 501(c)(3) non-profit corporation with approximately 74,000 members nationwide, and 1316 members in Missouri. RTC has an interest in preserving otherwise to be abandoned railroad rights of way for alternative public uses, including trails and railbanking. As the applicable decision (Missouri-Kansas-Texas Railroad Company - Abandonment - in St. Charles, et al Counties, MO, AB 102 (Sub-no. 13)), served March 16, 1987, slip op at p. 1 notes, RTC filed comments in the proceeding, supporting preservation of the property per Missouri Department Natural Resource's (MDNR's) interim trail use/railbanking request. Slip op at 6. Many RTC members use the Katy Trail now on the property.

<sup>2</sup> The Coalition is a 501(c)(3) with members and supporters who seek to preserve the Boonville Katy Bridge and secure its incorporation into the Katy Trail. The Coalition's address is P.O. 255, Boonville, MO 65233.

<sup>3</sup> Parks is a 501(c)(3) with over 2500 members state-wide in Missouri dedicated to fostering the State's park system, one of the finest in the Nation. The Katy Trail is one of the most popular of Missouri's state parks not only for users from Missouri but also nationwide and worldwide. Parks' address is Missouri Parks Association, P.O. Box 30036, Columbia, MO 65205.

to remove the so-called "Katy Bridge" across the Missouri River at Boonville, Missouri. In addition, in light of imminent threats to demolish the Bridge, and preliminary action already taken (partial removal of approximately 62 feet of the bridge), this Board must order UP to cease all demolition of the Boonville Katy Bridge until completion of the section 106 process.

#### Summary

This Board's predecessor, the Interstate Commerce Commission (ICC), postponed any compliance with NHPA section 106 with respect to any and all bridges on the entire rail line at issue in this proceeding until and unless a bridge were proposed for salvage. Union Pacific Railroad (UP) as successor to the Missouri-Kansas-Texas (MKT) Railroad now intends to salvage the Boonville Katy Bridge, and in fact has removed an approximate 62-foot long segment of it, without compliance with section 106.

Commenters seek enforcement of the conditions established by this Board's predecessor. Because UP is already acting unlawfully, this Board must order UP to cease and desist from all further action in connection with the Boonville Katy Bridge that would result in its demolition, removal, or salvage until there has been full NHPA section 106 compliance. UP's actions to date, including partial demolition, amount to an anticipatory demolition rendering section 110(k), 16 U.S.C. 470h-2(k), applicable as well.

## Background

### A. Law

Under 16 U.S.C. 470f, a federal agency may not engage in an undertaking prior to compliance with NHPA section 106, as implemented by regulations of the Advisory Council on Historic Preservation (ACHP) published at 36 C.F.R. Part 800. In general, prior consultation with the State Historic Preservation Officer (SHPO) and sometimes ACHP is required where a federal undertaking (such as a rail abandonment licensing action) may affect a structure or district that is eligible for listing, or is listed, on the National Register of Historic Places. In the event a party intentionally engages in anticipatory demolition (actions that have adverse effects prior to consultation, then another provision of NHPA is applicable: section 110(k), 16 U.S.C. 470h-2(k). This provision bars an agency from authorizing the action until it consults with ACHP, and then determines that circumstances nonetheless justify granting the license required by the applicant.

### B. Boonville Katy Bridge

The Boonville Katy Bridge is eligible for listing in the National Register of Historic Places. It consists of a 408 foot long vertical lift span flanked by three 300 foot-long fixed-truss spans on the north and a 247 foot-long truss span on the south, said to be the longest ever built at the time. The lift-

span can be raised or lowered in 70 seconds. The bridge employs a novel design of electrical lifting and automatic leveling machinery. There is an estimated 75 years of heavy train use left in the bridge. The bridge was identified as eligible for the National Register during the original abandonment proceedings for the M-K-T right of way of which it was (is) a part. Because the Boonville Katy Bridge is eligible for the National Register, federal agencies are required to comply with NHPA section 106 before authorizing any undertaking that has the potential to affect the bridge.

#### C. Proceeding Below

The Missouri-Kansas-Texas ("Katy") Railroad company sought authority to abandon its 199.92 mile line from Macbens (M.P. 26.92) to Sedalia (M.P. 226.84) in Missouri by application filed September 1986. Missouri Department of Natural Resources (MDNR) sought application of 16 U.S.C. 1247(d) (federal "railbanking" or "interim trail use" statute) to the entire property. In abandonment authorizations sought by application, 16 U.S.C. 1247(d) is implemented by issuance of a Certificate of Interim Trail Use ("CITU") pursuant to 49 C.F.R. 1152.29. This Board's predecessor, the Interstate Commerce Commission (ICC), served a Decision in Missouri-Kansas-Texas Railroad - Abandonment - in St. Charles, et al Counties, MO, AB 102 (Sub-no. 13), served March 16, 1987, stating that, absent an offer of financial assistance

(OFA), "a CITU will be issued." Slip op p. 10. No OFA was forthcoming, and the agency duly served a CITU for the entire line on April 27, 1987. This Board, as successor to the ICC, thus retains jurisdiction over the entire right of way.

For purposes here, the portion of the agency's March 16 decision of interest involves application of section 106 of the National Historic Preservation Act, 16 U.S.C. 470f. The agency's March 16 decision discusses "environmental issues" at some length. "Of prime concern was preserving historic structure such as bridges and buildings," ICC said (slip op at 8). "DNR's plan [to acquire the entire line for interim trail use] provides for preservation of these structures and their management. [The agency's environmental staff] determined that conversion of the right-of-way into a trail would preserve the historic and archaeological resources of the line." Id.

The agency then said that M-K-T could commence salvage of "track and materials 30 days after the CITU is issued" because "[s]alvage will not affect use of the right-of-way as a trail because bridges, culverts, and other structure will remain intact." Thus, further compliance with section 106 was not required for structures passing into trail use.

However, the agency noted that in the event of abandonment, there would be "a possible adverse effect on historical structures like bridges. Also M-K-T [in that event] will no

longer be obligated to maintain structures, resulting in further adverse impact." Id. at 8. The agency noted that removal of bridges could also adversely impact streams and waterways in the short term. Id. In order to address these impacts (before they occurred), the agency's environmental staff recommended that the agency impose a condition providing that in the event a railroad decided to abandon under a CITU, then there must be compliance with section 106 Id. ICC indicated that it would do so, The March 16 Decision in fact specifically provides that the CITU to be issued in the future will be subject to the condition that there must be section 106 compliance in the event of abandonment under the CITU. The condition (number 2, slip op at 9) reads in pertinent part as follows:

"If abandonment is effected under the CITU, MKT must (a) comply with the procedures in section 106 on NHPA and consult with the State Historical Preservation Officer for appropriate documentation of bridges and structures included in the National Register of Historic Places if they are to be demolished or substantially altered ...."

The CITU was served on April 27, 1987.

The MDNR and M-K-T railbanking agreement basically called for M-K-T to retain the bridge for possible future transportation use, but gave MDNR a right to acquire it for trail use. The remainder of the line at issue in this proceeding has become the

Katy Trail and a Missouri State Park.

D. Subsequent Developments

MDNR by letter dated December 23, 2004, sought to exercise its right to acquire the bridge. After intense lobbying by certain interests, MDNR on May 20, 2005, sent UP a letter waiving its right to the bridge and stating it would not object to abandonment of the bridge at UP's cost. On May 25, 2005, UP sent STB a letter stating that it was consummating abandonment authority in connection with the Boonville Katy Bridge (referred to in the UP letter as the "Boonville Lift Bridge). The letter states that UP "is not requesting any affirmative action from the Board, since this notice of consummation is self-executing." Letter, Mr. Opal (UP) to Mr. Williams (STB Secretary) in AB 102 (Sub-no. 13), dated May 25, 2005.

The UP letter states that the Coast Guard "has been demanding removal of the bridge since 1991" and that UP intends to remove the bridge "as soon as the necessary permits are received from the Coast Guard and Army Corps of Engineers." It further indicates that those agencies are addressing section 106 requirements as a part of their permitting process.

Ironically, notwithstanding the Coast Guard "demands" to which UP alludes, the Coast Guard has disclaimed any licensing authority per se over bridge removal. The Coast Guard's permit requirement instead deals with construction of bridges over



navigable waters. See 33 C.F.R. Part 115. But under ACHP regulations, an "agency official with jurisdiction over an undertaking" must take responsibility for section 106 compliance. 36 C.F.R. 800.2(a).

RTC learned in 2005 that the Coast Guard might undertake a section 106 review that could be germane to the Boonville Katy Bridge ancillary to a UP plan to construct a new bridge over the Osage River, over which the Coast Guard clearly (33 C.F.R. Part 115) does have licensing authority. RTC requested consulting party status in that process. The Coast Guard advised RTC that it would notify RTC "when a decision is made." The Coast Guard never responded. Instead, the Coast Guard issued a permit for the Osage River Bridge project on January 31, 2008. However, it failed to acknowledge that the construction of the Osage River Bridge would have any adverse effect on the Boonville Bridge, despite UP's claim at the time that it intended to use material from the Boonville Bridge for the new Osage River Bridge. The Coast Guard's actions in connection with the Osage River Bridge permitting process do not constitute section 106 compliance for destruction of the Boonville Katy Bridge. RTC sent the Coast Guard a letter making this clear dated June 16, 2008.

The Coast Guard has recently initiated what it calls a "section 106 review" in connection with removal of the Boonville Katy Bridge, despite the fact that the Coast Guard had previously

argued it did not have any licensing authority over said removal, and would therefore lack jurisdiction to administer section 106 as to that action under the ACHP regulations. See 36 C.F.R. 800.2(a).

Neither ICC nor STB have conducted a section 106 review in connection with the Boonville Katy Bridge, although ICC (thus STB) retained jurisdiction to do so in the 1987 Decision indicating that a CITU would be issued subject to section 106 compliance in the event abandonment authority were ever exercised. ICC, and now STB, are the appropriate agencies to conduct a section 106 review of removal of the Boonville Katy Bridge, because the federal rail regulatory agency all along has been the federal regulatory entity with authority over that bridge's abandonment.

Prior to any compliance with section 106, UP removed approximately 62 feet of the Boonville Katy Bridge in order to allow the Coast Guard to contend that the bridge was no longer useful for transportation, and to "force" its demolition. This amounts to an attempt to foreclose meaningful comment under section 106, and to an action of intentional anticipatory demolition under section 110(<). See 36 C.F.R. 800.9.

MDNR at no point requested modification of the applicable CITU to delete the Boonville Katy Bridge. The original CITU remains applicable to the entire line.

JP's actions in connection with the Boonville Katy Bridge have been controversial. See the Wikipedia entry for "Boonville Missouri," with a picture of the bridge from the Katy Trail.

#### ARGUMENT

##### A. STB Must Immediately Comply with Section 106

This Board as successor to the ICC is responsible to enforce the orders of the ICC. ICC in its March 15, 1987, decision required compliance with section 106 should M-K-T decide to effect abandonment under the CITU. Other than identify some bridges that were eligible for protection under section 106, the agency did not engage in any section 106 review and consultations to determine the effect of abandonment, or to avoid adverse effects. Instead, the agency specifically postponed such review and consultations until the bridge or bridges were actually to be abandoned. This in effect preserved ICC's jurisdiction over all bridges, not only for railbanking purposes, but to the extent necessary fully to comply with section 106. This agency, as successor to ICC, is now responsible to ensure compliance with section 106 before an effective abandonment of any bridge. See 36 C.F.R. 800.2(a) (agency with jurisdiction over undertaking must comply with section 106). On no account may the agency suffer demolition, salvage, or removal, until the agency has

complied with section 106.<sup>4</sup> Demolition, salvage or removal prior to compliance would amount to foreclosure of comment, forbidden under applicable ACHP regulations.<sup>5</sup>

This agency is responsible for compliance with section 106 in connection with UP's actions affecting the Boorville Katy Bridge pursuant to the conditions that ICC imposed on abandonment of all the bridges in the AB 102 (Sub-no. 13). Because UP and the Coast Guard are threatening the bridge with imminent destruction and removal, this Board must enforce its continued jurisdiction by ordering UP to cease and desist from all further action to demolish, dismantle, or remove the Bridge pending full compliance by STB with section 106.

Additionally, this agency may not rely on the section 106 reviews of any other agency. First, the Coast Guard licenses new bridges. It is not an appropriate agency to conduct a section 106 review on a bridge demolition, over which it does not have any direct licensing authority. See 36 C.F.R. 800.2(a). Second, STB has not participated in any process to designate any other

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<sup>4</sup> Applicable ACHP regulations make clear that "adverse effects on historic properties include ... [p]hysical destruction of or damage to all or part of the property .. " and "[r]emoval of the property from its historic location ...." 36 C.F.R. 800.5(b)(2).

<sup>5</sup> For example, the Board is required to consult with SHPO, ACHP, and other consulting parties in order to resolve adverse effects, all prior to the effectiveness of a licensing action. 36 C.F.R. 800.5(d)(2).

agency with licensing authority over bridge demolition as the lead agency for section 106 review. In such circumstances, ACHP regulations make clear that STB remains responsible for its own compliance. 36 C.F.R. 800.2(a)(2).

B. UP's May 25, 2005 "Consummation" Is a Nullity

M-K-T's successor, UP's Letter dated May 25, 2005, in which UP claims unilaterally to have consummated abandonment as to the Boonville Katy Bridge is a legal nullity, and shows only that UP is engaged in a scheme to destroy and to remove the bridge in violation of the conditions imposed in ICC's March 16, 1987 Decision. UP claims no further action by the Board is necessary, but action in fact is necessary.

First, ICC's March 16, 1987 Decision simply did not grant unilateral authority to consummate abandonment of bridges on the old M-K-T line. The Decision conditioned any future exercise of such abandonment authority on compliance with section 106. UP has not complied, nor could it, because compliance requires participation of this agency in consultations with UP, SHPO, ACHP and consulting parties to address adverse impacts.

ICC no more than STB has authority to waive compliance with the historic preservation condition, regardless when that condition was imposed. See Friends of Atglen-Susquehanna Bridge v. STB, 259 F.3d 246 (3d Cir. 2000) (reversing STB's decision to remove a similar historic preservation condition without

complying with Section 106). Instead, STB must comply with section 106 as to the bridge. Agency action - the completion of a licensing process - is necessary, contrary to UP's claims.

Additionally, UP cannot assume STB's responsibility to comply with section 106. The statute places the duty on the federal agency engaged in an actual "undertaking." Ironically, UP's letter misleads the agency and the public by suggesting that STB need do nothing. The UP letter was flatly wrong. As ICC's March 16, 1987 Decision indicates, ICC merely deferred its obligation to comply with Section 106 in connection with abandonment until the railroad sought to exercise such authority. UP cannot therefore "consummate" this authority unless and until STB discharge its obligation to comply with section 106 in connection with this undertaking. Until the section 106 process is complete, UP cannot destroy, dismantle, remove, or in any way alter the historic bridge.

STB cannot delegate the its responsibilities under section 106 to UP. The statute and regulations place the duty of compliance on the agency. The agency must comply before the license applicant gets relief which once effective could have adverse effects on section 106-protected property. Moreover, STB cannot rely on Coast Guard compliance. The Coast Guard's "Section 106" review to date is reluctant in the extreme, tortured at best, and in all events fraught with legal problems.

This is only to be expected not only because the Coast Guard failed to take into account the effects on the Boonville Bridge in exercising the Coast Guard's licensing authority over construction of the Osage River Bridge, but also in view of the Coast Guard's contention that it lacks regulatory authority over demolition of the Boonville Bridge. In any event, since STB had no involvement whatsoever in the Coast Guard's activities, the Board obviously cannot rely upon them to discharge its own section 106 responsibilities.

If UP wants to salvage the Boonville Katy Bridge, UP must first ask STB to initiate and to complete the section 106 process in accordance with the March 16, 1987 decision.

This agency in a policy statement has recently warned railroads that there will be consequences for unlawful de facto abandonments:

"In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then

be adversely affected. The Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them."

Consummation of Line Abandonments that Are Subject to Historic Preservation and Other Environmental Conditions, STB Ex Parte No. 678, served April 23, 2008, slip op. at p. 4. Although a CITU was issued in the M-K-T proceeding, the CITU carried a condition postponing section 106 compliance until such time as "bridges are to be demolished or substantially altered."<sup>6</sup> This license did not create a unilateral right on UP's part to avoid section 106 at the federal rail regulatory agency. Instead, it created a two-step process, in which section 106 would be required prior to any actions that could adversely affect the Bridge. By purporting to "consummate" abandonment without compliance with section 106, UP's action here is tantamount to an unlawful de facto abandonment.<sup>7</sup> As this agency indicated it would do in its

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<sup>6</sup> In more recent abandonments, this agency has required completion of the section 106 process even when railbanking is contemplated. But AB 102 (Sup-no. 13) was not such a case.

<sup>7</sup> E.g., Phillips v. Denver & R.G. RR, 97 F.3d 1375, 1377 (10<sup>th</sup> Cir. 1996) (de facto abandonments are illegal). As stated in GS Roofing Products Co. v. STB, 143 F.3d 387, 391 (8<sup>th</sup> Cir. 1998) (emphasis added), by "well established principle ... railroads 'are held to a higher standard of responsibility than most private enterprises.'" General Foods Corp. v. Baker, 451 F.Supp. 873, 875 (D.Ma. 1978). See also Ethan Allen, Inc v. Maine Cent. R..R. Co., 431 F.Supp. 740, 742-43 (D.Vt. 1977) (noting that "the quasi-public nature of railroads entails a higher degree of



policy statement, it must now "take whatever steps necessary to enforce compliance with [NEPA and NEPA]." "

In any event, the entire Katy line was subject to the CITU served April 27, 2007. The entire Katy line, including the Boonville Bridge, is railbanked and remains subject to STB jurisdiction. STB's regulations envision only two situations in which the CITU may be vacated relevant to the Boonville Katy Bridge: if the interim trail manager (MDNR requests that the CITU be terminated with respect to the Bridge (49 C.F.R. 1152.29(c)(2)), or "[i]f an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 or exempted under 49 U.S.C. 10502." 49 C.F.R. 1152.29(c)(3). Neither of these two scenarios are applicable here, and UP's "consummation" had no effect on the CITU or on the historic preservation condition set forth in the March 16, 1987 ICC Decision in AB 102 (Sub-no. 13).

#### C. UP Has Engaged in Anticipatory Demolition

UP has intentionally removed, or suffered to be removed, a segment of the historic Boonville Bridge already, knowing full well that prior compliance with section 106 is required. Partial

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public responsibility than is required of most private corporations". Thus, ... a railroad may not unilaterally abandon a line at its own election; it must instead apply for and receive permission from the proper administrative agency. See General Foods, 451 F.Supp. at 875-76."

demolition of a National Register-eligible bridge is an adverse effect. The ICC March 17, 1987 in effect so stated at slip op p. 8. In accordance with NHPA section 110(k), 16 U.S.C. 470h-2(k), a federal agency is precluded from granting a license in such circumstances "unless the agency, after consultation with the [ACHP], determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant." Under section 110(k), STB cannot allow consummation of abandonment by UP (that is demolition and removal) until making the required determination of justification after consultation with the ACHP. To the best of Commenters' knowledge, no one so far has consulted with ACHP, as required under 36 C.F.R. 800.9(c), on UP's prior demolition.

#### D. Consulting Parties

RTC, Coalition and Parks request consulting party status in the section 106 process in connection with the Boonville Katy Bridge. 36 C.F.R. 800.2(c)(5).

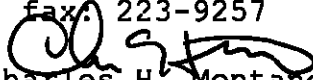
#### Conclusion

For the reasons stated above, this agency must enforce the condition imposed by its predecessor, ICC, in that agency's March 16, 1987 decision. STB must order UP to cease and desist from any further demolition, salvage, or removal of the Boonville Katy Bridge pending full compliance by STB with NHPA sections 106 and 110(k) in respect to that bridge.

Respectfully submitted,



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Conservancy; Save the Katy Bridge  
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Association

Certificate of Service

The undersigned hereby certifies service by U.S. Mail, postage pre-paid, first class (or priority or better), this 11 th day of March, 2009, upon the following:

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